UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY,

Respondent,

and

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES
IN AEROSPACE, IFPTE LOCAL 2001,

Charging Party

Case No. 19-CA-093656

Respondent's Reply Brief in Support of its Exceptions to the Decision of the Administrative Law Judge, Honorable Dickie Montemayor, in Case No. 19-CA-093656

I. INTRODUCTION

As it established in its opening brief, Boeing provided the relevant and responsive information needed by the Union to assess the claims made by Boeing relevant to contract negotiations. Thus, the ALJ erred in finding that Boeing violated 8(a)(5) and 8(a)(1) and in ordering Boeing to turn over even more, now stale, information in response to sweeping, two-year old information requests that is not relevant to Boeing's claims during contract negotiation.

The General Counsel acknowledges the applicable standard of relevancy is "information needed by the bargaining representative to assess *claims made by the employer relevant to contract negotiations*." (GC Br. at 3-4 (emphasis added)). But in their opposition briefs, the General Counsel and the Union effectively disregard this standard and replace it with one that requires an employer to give the Union whatever information it wants, regardless of whether it has any relationship to the "claims made by the employer relevant to contract negotiations."

Boeing also established that the record evidence confirms the Union has no present or on-going need for the now stale information it requested more than two years ago, and thus the ALJ erred when it ordered Boeing to produce it now. The General Counsel does not dispute and thus concedes that the Union has no present or on-going need for any additional information from Boeing. In its attempt to rebut Boeing's showing, the Union misstates or otherwise ignores Boeing's argument and the evidence proving no on-going need and relies on nothing but unsubstantiated attorney argument.

II. ARGUMENT

A. The ALJ Erred In Finding Section 8(a)(5) and 8(a)(1) Violations When Boeing Fully Complied with the Union's Information Requests

1. The ALJ Erred In Finding That Boeing Did Not Sufficiently Respond To The Union's Request Regarding Premium Pay

In its opening brief, Boeing established that any references to the "current premium paid"

to the Puget Sound engineering employees referred, of course, to the Tier 1 premium compensation (*i.e.*, 7% more than the national average) Boeing pays Puget Sound engineering employees. (Opening Br. 17-19). Boeing also established that it provided the Union with full and complete information concerning the Tier 1 premium. (*Id*.) Neither the General Counsel nor the Union dispute, and therefore both concede, that Boeing provided the Union with complete information concerning the Tier 1 premium compensation paid to Puget Sound employees.

Instead they argue that the Tier 1 premium compensation paid to Puget Sound employees is not the only "premium paid" to Puget Sound employees. (GC Br. at 5-6; CP Br. 11-13). The Union erroneously reasons that because employees in three other regions – Southern California, Washington, D.C., and Chicago – also receive Tier 1 premium compensation, Boeing must have been referring to some other "premium" for Puget Sound employees. (CP Br. 11-12). That the Tier 1 premium paid to Puget Sound employees is not exclusive to Puget Sound does not mean that Boeing was referring to something other than Tier 1 compensation, and the record evidence confirms it was not. First, the vast majority of the bargaining unit employees are Puget Sound employees, and so the Puget Sound region was the focus of the contract negotiations. Second, as the Union recognized at the hearing, the relevant "premium" comparison during bargaining was between Puget Sound employees, who received Tier 1 premium compensation, and employees in Charleston, South Carolina and Huntsville, Alabama, who did not. (Tr. 87-89).

The General Counsel's opposition is equally puzzling.[1] It argues that there is no evidence that the Union knew that any references to the "premium" paid to Puget Sound employees meant the Tier 1 premium compensation paid to Puget Sound employees, and also that there is no

[1] That the General Counsel has to resort to nothing more than attempting to dismiss Boeing's argument as "implausible" and "fallacious" demonstrates that it has no legitimate response.

mention of Tier 1 compensation in the Bloomberg article. (*See* GC Br. 6). But that is irrelevant. The premium is the premium, and Boeing's bargaining positions and assertions at the bargaining table are what they are. They are not defined by the Union's understanding nor its spin. The Union cannot fictitiously redefine Boeing's position into something other than what it was in order to demand irrelevant and non-existent information. As the Union should know, there was and is no separate "premium" paid to Puget Sound engineering employees beyond the Tier 1 premium compensation. Consequently, the ALJ's finding that Boeing refused and failed to fully respond to requests for "premium" information should be reversed.

2. The ALJ Erred In Finding That Boeing Did Not Sufficiently Respond To The Union's Request For Information Concerning Boeing's Statement About The Rate Of Growth In The Previous Contract

With respect to the Union's September 11th Requests 4(b) and (c), Boeing established in its exceptions brief that it fully shared the data, assumptions, and analyses it used for its statement about the rate of growth in the previous contract and provided the basis for its statement concerning the rate of growth in the previous contract during information sessions. (Opening Br. 19-21).

In response, the General Counsel and Union complain that all of the information Boeing provided in response to this request came before Boeing's statement that purportedly triggered the Union's request for information about the rate of growth in the previous contract. (*See* GC Br. at 6-7, CP Br. 13-15). It is irrelevant whether Boeing had already provided the responsive information before the Union made its request. The basis for Boeing's opinion about the rate of growth in the previous contract is what it is, and the General Counsel's own exhibit shows that Boeing promptly responded to the Union's request by explaining that its opinion was based on information that it had already given the Union. (*See* Opening Br. 19-21 citing GC Ex. 11;

Tr. 249-50, 258, 264-65, 266, 268, 284, 286-87; R. Ex. 17, at 32, 36; R. Ex. 18, at 15). The Union's apparent failure to consider or appreciate the information Boeing had already provided does not render incomplete Boeing's response to a subsequent request for that same information.

Furthermore, Boeing promptly provided additional responsive information *after* the Union's request, including a further explanation of its position and an additional chart showing that Union salaries under the then-existing collective bargaining agreements were already 7% higher than the national market rate in 2012 and that the gap would continue to expand each year if annual salary increases exceeded the expected national market rate of 3%. (GC Ex. 11).

The General Counsel also argues that Boeing should have clearly conveyed that the requested information did not exist. But the requested information did exist and Boeing had already provided it. As Boeing explained in its response: "[w]e shared the basis for our opinions in detail during the Company's presentation on the competitive business environment delivered during our August 16, 2012 meeting and throughout the negotiations to date." (GC Ex. 11).

In its brief, the Union, citing no record evidence, attempts to substitute its own manufactured definition of "unsustainable" for the actual meaning of that term as used by Boeing for its bargaining position. But, again, Boeing's position is Boeing's position. (*See* CP Br. 14). The Union's erroneous attempt to redefine Boeing's position does not change the fact that Boeing provided the information needed by the bargaining representative to assess the claims that Boeing actually made in the course of contract negotiations, specifically the basis for its statement concerning the unsustainable rate of growth under the old contract. Thus, the ALJ's finding that Boeing did not respond to September 11th Requests 4(b) and (c) should be reversed.

3. The ALJ Erred In Finding That Boeing Did Not Sufficiently Respond To The Union's Request For "Engineering Cost" Information

In its opening brief, Boeing established that the ALJ improperly broadened the term "engineering costs" far beyond its intended meaning, and contradicted his own ruling by relying on the truth of matters asserted in a hearsay Internet article, to find that Boeing should have produced irrelevant information beyond the labor costs at issue in response to the Union's September 11th Requests 1(a), (b) and (c). (Opening Br. 21-26).

The Union does not dispute and thus concedes that any Boeing references to "engineering costs," meant engineering *labor* costs and nothing else. The Union also does not dispute, and thus concedes, that Boeing provided relevant engineering labor cost information in response to the Union's September 11th Requests 1(a), (b), and (c). (*See* Opening Br. 21-26).

But the Union argues it was entitled to more. In doing so, it mischaracterizes Boeing's argument.[2] Boeing does not argue that it is obligated to produce only information that it deems pertinent. Rather, Boeing argues that the basis for the ALJ's finding is erroneous. Specifically, the ALJ found "information regarding calculations and explanation of productivity costs, engineering costs, and engineering overhead" relevant because Boeing had put such information at issue through its statements at the bargaining table and in a news article. In doing so, the ALJ improperly disregarded the uncontroverted testimony that the only "engineering costs" ever at

[2] The Union also incorrectly argues that Boeing did not challenge the ALJ's findings as to the requests' relevance and thus waived the right to challenge the scope of its Request. That is precisely what Boeing challenged. *See* Opening Br. 4 (Raising the issue of "[w]hether the ALJ erred by finding overhead, productivity, and other non-labor costs ***relevant*** and responsive to a request for information concerning Boeing's purported reference to 'engineering costs' in a news article even though Boeing confirmed that labor costs are the only "engineering costs" it considered in its compensation proposals and bargaining positions?"). *See also* Boeing's Exception Nos. 7-15, 19, 20, 24, 26-28.

issue were labor costs. (Tr. 248-60, 266-67; GC Ex. 11; R. Exs. 17, 18).

The ALJ also contradicted its own prior ruling when it relied on the truth of the matters asserted in an Internet article to establish the relevancy of the information the Union requested, despite explicitly not admitting the article for the truth of any matters asserted therein at trial. In arguing otherwise, the Union and General Counsel misstate the ALJ's decision and the ALJ's ruling at trial.[3] First, the ALJ admitted that the Internet article only for "what is on the face of the document, what appears on the face." (Tr. 81:18-22). Second, contrary to the Union's argument (*see* CP Br. 19), when the ALJ incorrectly held that expansive information concerning "engineering costs" was relevant, he did not rely on the article for "why [the Union] took subsequent actions," but rather on the erroneous finding that Boeing put such information at issue. (ALJD p. 9, 11; Tr. 241; GC Ex. 7; *see also* Opening Br. 25-26).

The cases cited by the General Counsel to justify the ALJ's reliance on hearsay and contradiction of his own ruling are inapposite. *Shoppers Food Warehouse*, 315 NLRB 258 (1994), concerned a request for information in connection with the investigation of a contract violation. *Magnet Coal, Inc.*, 307 NLRB 445 (1992), concerned a request for information to show that an alter ego, or a joint employer relationship, existed. The particular standard for that specific request is whether the Union can demonstrate ''an objective factual basis for believing that such a relationship existed." *Id*. at 447-48. Here, the ALJ wrongly relied on the truth of the

[3] The Union again wrongly argues that Boeing's challenge to the ALJ's improper reliance on hearsay is moot because Boeing did not challenge the relevancy of the engineering cost information (beyond the engineering labor cost information that Boeing provided). *See supra* n.2; Opening Br. 4 (raising "whether the ALJ erred when he relied on hearsay statements from an Internet article to find that Boeing had made broad, overall 'engineering cost' information ***relevant*** to the collective bargaining process despite the ALJ's own ruling that the Internet article was not admitted for the truth of the matters asserted therein?"); Boeing's Exception Nos. 7-9.

matters asserted in the article to determine that Boeing had put issues in play when it had not.

Accordingly, the ALJ's finding that Boeing put overall "engineering costs" beyond labor costs at issue and failed to provide that information to the Union should be reversed.

4. The ALJ Erred In Finding That Boeing Did Not Sufficiently Respond To The Union's Request For Non-Boeing Labor Information

The General Counsel and the Union do not dispute, and thus concede that:

- there is no relationship between *temporary* contract labor and the market rate for *non-temporary, fully-fringed* employees (Opening Br. 28 citing Tr. 269-70, 290);
- Boeing, with the Union's support, uses contract labor from contingent labor suppliers only on a temporary basis to fill immediate and temporary needs for skilled workers (*see* Opening Br. 5, 28 n.7 citing Tr. 288-91); and
- despite its irrelevancy to Boeing's compensation proposal *and the market rate for fully-fringed, permanent employees*, Boeing provided the Union with detailed information concerning the wage rates that contract labor suppliers paid to temporary contract workers in response to the Union's September 20th request for such information (Tr. 235, 255, 269-70, 280, 290; GC Exs. 17-20; R. Ex. 18, at 4).

Yet despite conceding the lack of any relationship between temporary, contract labor for workforce stabilization and the market rate for *non*-temporary, fully-fringed employees, the Union claims in its brief that it needed comprehensive information about all elements of contract worker costs, including third-party supplier overhead costs. (CP Br. 20-32). The Union offers nothing but attorney argument in support of this claim. The only testimony to which it cites merely states that the Union wanted to know what Boeing paid for contract labor; it does not provide any explanation of how such information would be relevant to the parties' contract

negotiations. (*See* CP Br. 23 citing 104:9-12, 104:14-106:4). Thus, the September 20th Request sought information entirely irrelevant to the market wage rate of individual engineering and technical employees; therefore, Boeing had no obligation to provide it. Accordingly, the ALJ's finding that Boeing violated Sections 8(a)(5) and 8(a)(1) of the Act by not producing information related to non-Boeing labor should be reversed.

B. The ALJ Erred By Ordering Respondent To Provide Sweeping And Stale Information When The ALJ Did Not Find That The Union Had Any On-Going Need For the Information

Boeing established that the record evidence shows the Union represented that each of its September 2012 requests were designed to evaluate Boeing's *then-bargaining positions* so that the Union could knowledgeably negotiate a new collective bargaining agreement, and, since that has already happened, the Union has no on-going need for the now stale information. (Opening Br. 29-34). The General Counsel's opposition ignores this point, and thus concedes that the Union has no present or on-going need for the information it requested two-years ago.

The Union erroneously claims that Boeing points to no evidence showing the Union had no on-going need for the information, and then violates its own rule by offering nothing but unsupported attorney argument to now claim there is some on-going need. (*See* CP Br. 25-27). Contrary to the Union's opposition, Boeing showed how the record evidence, including the nature of the Union's requests, the short period between the Union making its requests and submitting Boeing's offer to its membership for ratification vote, the termination of bargaining and negotiations with the ratification of new contracts running through 2016, and the Union's testimony about bargaining being driven by the economic circumstances "at that point in time," demonstrates that the Union had no on-going need for the information. (*See* Opening Br. 29-34). Neither the Union nor General Counsel cite any evidence showing any on-going need for the

requested information in their opposition briefs because none exists. Accordingly, it does not matter whether the Union has the burden of proving an on-going need or Boeing has the burden of proving the absence of such need. The only conclusion supported by the evidence is that the Union has no on-going need for the information.

The Union attempts to avoid this reality by arguing that "the subsequent execution of a contract is no defense in a Section 8(a)(5) proceeding." (CP Br. 24). In doing so, the Union makes the same mistake the ALJ made – conflating the issue of whether there is a violation with the issue of the appropriate remedy. Contrary to the Union's argument, the issue is not whether a subsequent collective bargaining agreement has mooted the *past violation*, but whether the subsequent agreement has mooted any *present* need for the now stale information.

The Union also incorrectly asserts that the Board ordered the production of information without any discussion of further need in *Armored Transport of CA*, 288 NLRB 574 (1988), and *Lumber & Mills Employers Assn's*, 265 NLRB 199 (1982). The *Armored Transport* decision discussed the Union's on-going need for the requested information in connection with negotiations for facilities that were still in progress. 288 NLRB at 579. There are no such negotiations still in progress here. Similarly, as Boeing explained in its opening brief (Opening Br. 31-34), the *Lumber & Mills* decision included express factual findings that the Union still had an on-going need for select portions of the respondent's *current* bylaws and membership lists that the union requested. 265 NLRB at 204. Specifically, the Board found that the union "clearly indicated the [subsequent collective-bargaining] agreement did not resolve their need for the information . . . for its probable and potential use in determining the advisability of grievances or other action over the nonapplication of the agreement to certain firms or

locations," and recommended a "narrow" remedy tailored to that on-going need.[4] *Id*. at 204.

The General Counsel cites just two other cases to argue that there is "a long-established history" of requiring Respondents to turnover requested information made during the course of negotiations even after parties reach a collective bargaining agreement. (GC Br. 10). But neither case is relevant as both concerned a Respondent's refusal to provide ***current*** wage rate information for bargaining unit employees. *See NLRB v. Yaman & Erbe Mfg. Co*., 187 F.2d 947 (2nd Cir. 1951); *The Detroit News*, 270 NLRB 380 (1984). There is no such allegation here. Additionally, in *Detroit News*, the Board ordered wage rate information for one employee when the parties entered into only a one-year agreement and were entering negotiations for a new agreement, and thus, unlike here, there was a present need for the information. Accordingly, the ALJ's order that Boeing turnover sweeping and stale information despite the Union having no on-going need for such information should be reversed.

III. CONCLUSION

Because Boeing provided information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations, the Respondent respectfully requests the Board to reverse the Decision in this matter and find that Boeing did not violate Sections 8(a)(1) and (5) of the Act.

Respectfully submitted this 24th day of October, 2014.

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[4] In claiming that Boeing did not address *Lumber & Mills*, Counsel for the General Counsel apparently disregarded Boeing's discussion of how it counsels against the broad and unnecessary remedy proposed by the ALJ here. (*See* Opening Br. 31-24).

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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the **RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was served via electronic mail upon the following individuals:

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This 24th day of October 2014.

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